

**FILED**

APR 18 2022

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
BY                       
DEPUTY CLERK

Randy Lee Stapleton  
Name  
77152-112  
Prison Number  
FCI - Herlong  
P.O. BOX 800  
Herlong, CA. 96113.  
Address (or) Place of Confinement

Note: If represented by an attorney, write attorney's name, address & telephone number

*United States District Court*  
EASTERN DISTRICT OF CALIFORNIA

Randy Lee Stapleton  
Full Name (First, Middle, Last)

Petitioner,

vs.

Paul Thompson  
Name of Warden  
(or other authorized person having custody of petitioner)

Respondent.

CASE NO. 2:22 CV. 0678 DMC HC  
(to be supplied by the Clerk of the  
United States District Court)

PETITION FOR  
WRIT OF HABEAS CORPUS  
PURSUANT TO 28 U.S.C. § 2241  
BY A PERSON IN FEDERAL CUSTODY

PLEASE COMPLETE THE FOLLOWING (check the appropriate number):

This petition concerns:

1. \_\_\_\_\_ a conviction
2. \_\_\_\_\_ a sentence
3. \_\_\_\_\_ jail or prison conditions
4. \_\_\_\_\_ prison discipline
5. \_\_\_\_\_ a parole problem
6. XXXXX other

**CAUTION:** If you are attacking a federal conviction, sentence or judgment, you must first file a direct appeal or motion under 28 U.S.C. § 2255 in the federal court which entered judgment.

### PETITION

- (1) Place of detention: N/A
- (2) Name and location of court which imposed sentence: N/A
- (3) Offense(s) and indictment number(s) (if known) for the sentence imposed: N/A
- (4) The date the sentence was imposed and the terms of the sentence: N/A
- (5) What was your plea (check one): Not guilty ( ) Guilty ( ) Nolo contendere ( )
- (6) Kind of trial (check one): Jury ( ) Judge only (✓)
- (7) Did you appeal from the judgment of conviction or the imposition of sentence: Yes ( ) No ( )
- (8) If you did appeal, answer the following for *each* appeal:

FIRST APPEAL:

Name of court: N/A

Grounds raised (list each):

1) N/A

2) N/A

Result/Date of result: N/A

SECOND APPEAL:

Name of court: N/A

Grounds raised (list each):

1) N/A

2) N/A

Result/Date of result: N/A

### GROUND FOR THIS 28 U.S.C. § 2241 PETITION

- (9) State *CONCISELY* every ground on which you claim that your sentence is being executed in an illegal manner. Summarize *briefly* the facts supporting each ground

**CAUTION:** If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

- GROUND ONE Being denied Second Chance Act when "Prisoners" are legally eligible to be placed in RRC at "any time" during my sentence". 18 U.S.C. § 3621(b). I am requesting to do the remainder of my sentence at a (RRC).  
Supporting FACTS for GROUND ONE (tell your story BRIEFLY without citing cases or law).

CAUTION: You must state *facts*, not *conclusions*, in support of your grounds. A rule of thumb to follow is -- who did exactly what to violate your rights at what time or place.

I requested to my case manager, unit manager, and FCI Herlong Warden R. Paul Thompson respectfully for immediate consideration for transferring to residential re-entry Center (RRC) pursuant to 18 U.S.C. § 3621(b), and without reference to certain BOP policies that I asserted contradict the plain language, and Congress's intent of § 3621(b). I was denied, and told I was ineligible, they will not consider placement until 17-19 months preceding my release date. I am filing "writ" challenging BOP regulations.

- GROUND TWO (The BOP Regulations violate the Clear and Unambiguous Congressional Intent Expressed in § 3621(b).

Supporting FACTS for GROUND TWO (tell your story BRIEFLY without citing cases or law).

Due to the BOP denying my requests to immediately consider transferring me to (RRC) placement for a less restrictive placement. After having served "over 60 percent" of my sentence, and "never receiving (any incident report)" my whole 40 months in BOP whole programming, and completing programs to reduce my recidivism - like non-residential (RDP), and others. I am being labelled "ineligible, and denied" for immediate consideration of transfer to (RRC) without cause. I respectfully request this Court order BOP to transfer me to (RRC) placement.

#### ADMINISTRATIVE APPEALS

- (10) Have you presented the claims raised in Question #9 of this petition to prison officials in a prison administrations appeal?

Yes ( ) No ( ) If your answer is no, explain why not: N/A

If your answer is yes, answer the following for *each* administrative appeal:

#### FIRST ADMINISTRATIVE APPEAL

Level of appeal: N/A

Grounds raised (list each):

1) N/A

2) N/A

Result/Date of result: N/A

#### SECOND ADMINISTRATIVE APPEAL

Level of appeal: N/A

Grounds raised (list each):

1) N/A

2) N/A

Result/Date of result: N/A

THIRD ADMINISTRATIVE APPEAL

Level of appeal: N/A

Grounds raised (list each):

1)

2)

Result/Date of result:

FOURTH ADMINISTRATIVE APPEAL

Level of appeal: N/A

Grounds raised (list each):

1)

2)

Result/Date of result:

- (11) Is the grievance process completed? Yes ( ) No ( ) N/A

PREVIOUS PETITIONS

- (12) Have you filed previous petitions for habeas corpus under 28 U.S.C. § 2241 or 28 U.S.C. § 2255, or any other applications, petitions or motions with respect to the claims raised in Question #9 of this petition?

Yes ( )

No (✓)

- (13) If your answer to Question #12 was yes, give the following information for *each* previous petition:

FIRST PREVIOUS PETITION

Name of court:

Nature of proceeding:

Grounds raised (list each):

1)

2)

Result/Date of result:

SECOND PREVIOUS PETITION

Name of court:

Nature of proceeding:

Grounds raised (list each):

1)

2)

Result/Date of result:

- (14) If the claims raised in Question #9 of this petition concern your conviction or sentence, explain why you are filing your petition pursuant to § 2241 instead of § 2255.

(15) Are you presently represented by counsel?

Yes ( )

No (✓)

If so, provide your attorney's name, address, and telephone number:

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(16) If you are seeking leave to proceed *in forma pauperis*, have you completed the application setting forth the required information?

Yes ( )

No (✓)

Note: If your answer is no, you must send a \$5.00 filing fee to the court with your petition.

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WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

(Mar.)

03/25/2022

(Date)



(Signature of Petitioner)

(Signature of Attorney, if any)



RANDY LEE STAPLETON,  
Petitioner,  
  
VS.  
  
PAUL THOMPSON, Warden  
Federal Correctional Institution  
Herlong,  
Respondent.

Case No. CV- 2:22 CV. 0678 DMC HC

HABEAS CORPUS

PURSUANT TO 28 U.S.C. § 2241

COMES NOW, the Petitioner, Randy Lee Stapleton, Pro Se, respectfully moves this Court to issue an order, directing Warden Thompson who controlled (Administrative at the Federal Correctional Institution located in Herlong, California) at the time I ~~of~~ request for administrative remedy to correctly follow 18 U.S.C. § 3621 (b) as mandated by Congress, and not the vague, and ambiguous policy adopted by the Bureau of Prisons (BOP) in 2002 or 2005 that has been continuously deemed invalid by several United States Circuit Courts, including this District Court, and immediately transfer Petitioner to a Residential Re-entry Center (RRC) for the remainder of his sentence.

This Court has jurisdiction over this matter. Petitioner, is a federal prisoner seeking to challenge the manner, location, or conditions of his sentence's execution and therefore must proceed with a Habeas Corpus, brought pursuant to § 2241, in the Court that has jurisdiction over the prison in which he is incarcerated.

Furthermore,  
even though Petitioner has exhausted his administrative remedies. Petitioner need not exhaust his administrative remedies because he is not challenging the application of BOP policy, but its validity, and therefore exhaustion would be futile.

The Petitioner submits this memorandum brief in support of his motion § 2241.

DATE: this 25<sup>th</sup> day of March, 2022.

/s/ RS  
Randy Lee Stapleton, Pro Se  
Reg# 77152-112  
Federal Correctional Institution Herlong  
P.O. Box 800  
Herlong, CA. 96113.

MEMORNDUM BRIEF  
STATEMENT OF CASE

PURSUANT, to a plea agreement, Petitioner pled guilty to one count of violating 21 U.S.C. §§ 841 possession of 17.94 grams of Methamphetamine with intent to distribute and was sentenced to 77 months in Federal Prison on August 5<sup>th</sup>, 2019. Petitioner has been in Federal custody, since September 4<sup>th</sup>, of 2018 and accrued all possible good time credit (GTC).

Petitioner has now served 60.9 percent of his sentence and should be considered for a less restrictive place of imprisonment according to 18 U.S.C. § 3621(b).

During his last Program Review (Unit Team), Petitioner was advised that he is not eligible for consideration for RRC/CCC placement until 12-13 months, and prior to that Program Review (Unit Team), Petitioner was also advised that he is not eligible for consideration for RRC/CCC placement until 17-19 months prior to projected release date (PRD) Citing BOP Program Statement 7310.04

CCC CRITERIA AND REFERRAL GUIDELINES. This BOP policy is also in direct conflict with § 3621(b), it is a derivative of § 3624, but contradicting of § 3621(b). Also ~~that~~ <sup>these</sup> regulations are (BOP Program Statement 7310.04) invalidated by this Court, and many Circuit Courts. Petitioner is not asking for a release. The BOP's reliance on a pre-release policy and CCC/RRC utilization policy is substantially prejudicial to the correct determination of Petitioner's place of imprisonment. Petitioner has requested to be appropriately considered for CCC/RRC placement to serve the remainder of his sentence.



As Congress gave the authority to the BOP to correctly exercise discretion under §3621 through the Sentencing Reform Act of 1984, they also removed Federal Parole with the implementation of the Federal Sentencing Guidelines in 1987, creating a 500 percent increase in Federal Prisoners between 1987 and 2006. When 16 years ago recidivism rates was approaching 70 percent, and now beyond that 70 percent, its clear proof that the BOP is still fostering institutionalism rather than rehabilitation. Even well ~~after~~ after 36 months of the First Step Act enacted December 21, 2018 to create programs to reduce high recidivism, yet my high recidivism has been stuck for 41 months of Petitioner's whole imprisonment, while petitioner has done everything required of him by (Unit Team). Petitioner prays this Court will intervene, and provide him opportunity to rehabilitate.

MEMORANDUM BRIEF  
SUPPORTING CASE LAW

According to 18 U.S.C. § 3621(b) the BOP has a duty to consider the enumerated factors set forth in the consideration of each individual prisoner on a case by case basis to determine the appropriate place of imprisonment see Woodall v. Federal Bureau of Prisons, 432 F.3d 235 (3rd Cir. 2005); Fultz v. Sanders, 442 F.3d 1088 (8th Cir. 2006); Levine v. Apter, 455 F.3d 71 (2nd Cir. 2006); and in this District Court Horn v. Ellis, NO. 06-CV-F-0006-OWW-TAB-HC (April 21, 2006); and Arcandiano v. Wrigley, Case No. 06-CV-00780-AWI-DLB-HC, and Rodriguez v. Smith, Case No. 1:07-CV-00190-OWW-LJO-HC, all consistently finding the BOP regulations of 2002 and 2005 are contrary to, or an impermissible construction of the Section 3621(b) as Congress mandated, and

therefore finding 28 C.F.R. § 570.20 and 21 invalid.

Furthermore, Petitioner continued exhaustion of the (BOP) administrative remedy process to Western Regional Office, in which has only proven to be futile, so therefore unnecessary to continue, and 30 days has lapsed since. Futility is an exception to the exhaustion requirement. Lainz v. Ashcroft, 370 F.3d 994, 1000-01 (9th Cir. 2004).

Therefore, Petitioner, a prisoner incarcerated in this secure facility within the BOP, respectfully submits this petition requesting this Honorable Court to Order Warden Thompson to correctly follow § 3621(b) and immediately transfer Petitioner to a RRC nearest his place of release.

DATED: this 25th day of March, 2022.

/s/ Randy Lee Stapleton

Randy Lee Stapleton, Pro Se

Federal Correctional Institution

P.O. Box 800

Herlong, CA. 96113.

(BOP) Creditable "Exhibits" to transfer me to (RRC).  
0

To Whom It May Concern,

Please be advised that FCI Herlong has been on lockdown off and on throughout the 2021-2022 fiscal years. Due to this, our ability to program has been limited, and the vast majority of our inmates who have been here during the lockdown have been unable to participate in regular educational and/or vocational activities.

Sincerely,



R. Ferrin

Teacher, Federal Correctional Institute Herlong, California

## U.S. DEPARTMENT OF JUSTICE

## FEDERAL BUREAU OF PRISONS

Register Number: 77152-112

Inmate Name

Last.....: STAPLETON

First.....: RANDY

Middle.....: LEE

Suffix.....:

Gender.....: MALE

Risk Level Inmate.....: R-HI

General Level.....: R-HI (52)

Violent Level.....: R-MED (29)

Security Level Inmate: HIGH

Security Level Faci...: MEDIUM

Responsible Facility.: HER

Start Incarceration...: 08/05/2019

## PATTERN Worksheet Summary

| Item                                    | - Value        | - General Score | - Violent Score   |
|---|----------------|-----------------|-------------------|
| Current Age                             | 44             | 14              | 8                 |
| Walsh w/Conviction                      | FALSE          | 0               | 0                 |
| Violent Offense (PATTERN)               | FALSE          | 0               | 0                 |
| Criminal History Points                 | 49             | 40              | 20                |
| History of Escapes                      | 3              | 6               | 3 ← 23 years ago. |
| History of Violence                     | 3              | 3               | 3 ← no violence   |
| Education Score                         | EnrolledInGED  | -2              | -1                |
| Drug Program Status                     | CompletedNRDAP | -3              | -1                |
| All Incident Reports (120 Months)       | 0              | 0               | 0                 |
| Serious Incident Reports (120 Months)   | 0              | 0               | 0                 |
| Time Since Last Incident Report         | N/A            | 0               | 0                 |
| Time Since Last Serious Incident Report | N/A            | 0               | 0                 |
| FRP Refuse                              | FALSE          | 0               | 0                 |
| Programs Completed                      | 8              | -6              | -3                |
| Work Programs                           | 0              | 0               | 0                 |
|   | Total          | 52              | 29                |

Due to me doing everything required of me by the (BOP) without ("Any Incident Reports") why is my Risk Level High, and has never changed - nor do I have "Any History of violence but I am being scored, and given points for violence by the BOP? But let's say this is "theoretically true"... as far as the high-level risk - recidivism. Then this would be "evident" as the (BOP's) memorandums behind this document says: (BOP); Our strategy is to focus on inmates who are at higher risk of recidivating and who have established a record of programming during incarceration, so that pre-release RRC placements will be as productive and successful as possible etc... Please review. So, if I am as they claim (BOP) a high risk recidivism inmate I should or am "a prime candidate" that (BOP) are referring to focus on for RRC placement as a mechanism to reduce my high recidivism. By their denial to transfer me to RRC Placement is purposely hindering my successful re-entry to be productive. But BOP is continuing to foster institutionalism, and not rehabilitate.



Washington, DC 20534

June 24, 2010

MEMORANDUM FOR CHIEF EXECUTIVE OFFICERS

FROM:

  
D. Scott Dodria, Assistant Director  
Correctional Programs Division

SUBJECT:

Revised Guidance for Residential Reentry Center  
(RRC) Placements

This memorandum provides guidance to staff when making inmates' pre-release Residential Reentry Center (RRC) placement decisions. Assessment and decision-making practices are to focus on RRC placement as a mechanism to reduce recidivism. Recidivism reduction results in cost efficiencies, less victimization, and safer communities.

Our RRC resources are limited and must be focused on those inmates most likely to benefit from them in terms of anticipated recidivism reduction. In other words, our decisions are to be based on an assessment of the inmate's risk of recidivism and our expectation that RRC placement will reduce that risk. Our strategy is to focus on inmates who are at higher risk of recidivating and who have established a record of programming during incarceration, so that pre-release RRC placements will be as productive and successful as possible.

As Chief Executive Officers, you play a vital role in implementing the Bureau of Prisons' (Bureau) reentry strategy, including RRC utilization. This guidance will assist you in making RRC placement decisions.

**GENERAL CONCEPTS** - The following general concepts apply to all RRC placement assessments and decision-making:

**Eligibility vs. Appropriateness** - When making RRC placement determinations, it is critical that staff understand the difference between eligibility and appropriateness. All inmates are statutorily eligible for up to 12 months pre-release RRC





Federal Bureau of Prisons

Washington, D.C. 20534

**MAY 24 2013**

MEMORANDUM FOR REGIONAL DIRECTORS  
WARDENS  
RESIDENTIAL REENTRY MANAGERS

A handwritten signature in black ink, appearing to read "B. R. Davis", is positioned above the "FROM:" line.

FROM: Blake R. Davis, Assistant Director  
Correctional Programs Division

SUBJECT: Guidance for Home Confinement and Residential  
Reentry Center Placements

This memorandum is a compilation of previous guidance memoranda, policy, and practices regarding home confinement and Residential Reentry Center (RRC) placement decisions, as they relate to current policy, practice, and changes which were necessitated by the passage of the Second Chance Act of 2007. The intent of this memorandum is to reemphasize and clarify established policies and practices to facilitate effective community placements.

**I. GUIDING PRINCIPLES FOR EFFECTIVE COMMUNITY PLACEMENTS**

The Bureau's RRC resources continue to be limited and must be focused on those inmates with the greatest need and the highest risk of recidivism. Program Statement 7310.04, Community Corrections Center Utilization and Transfer Procedures, requires that RRC placements be made based on assessments of inmate needs for services, public safety, and the necessity of the Bureau to manage its inmate population responsibly. The Second Chance Act emphasizes the requirement that all inmates are eligible for pre-release RRC placement consideration and are to be assessed on an individual basis.

offer assistance to a prisoner during such pre-release custody."

18 U.S.C. § 3621(b) provides: \*

"The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility . . . the Bureau determines to be appropriate and suitable." A CCC meets the definition of a "penal or correctional facility."

Therefore, the Bureau is not restricted by § 3624(c) in designating a CCC for an inmate and may place an inmate in a CCC for more than the "last ten per centum of the term," or more than six months, if appropriate.

Section 3624(c), however, does restrict the Bureau in placing inmates on home confinement to the last six months or 10% of the sentence, whichever is less.

6. PRETRIAL/HOLDOVER AND/OR DETAINEE INMATES. This Program Statement does not apply to pretrial, holdover, or detainee inmates.

7. COMMUNITY-BASED PROGRAMS

a. Community Corrections Centers (CCC). CCCs, commonly referred to as "halfway houses," provide suitable residence, structured programs, job placement, and counseling, while the inmates' activities are closely monitored. All CCCs offer drug testing and counseling for alcohol and drug-related problems. During their stay, inmates are required to pay a subsistence charge to help defray the cost of their confinement; this charge is 25% of their gross income, not to exceed the average daily cost of their CCC placements. Failure to make subsistence payments may result in disciplinary action.

These contract facilities, located throughout the United States, provide two program components: the Community Corrections Component and the Prerelease Component:

(1) The Community Corrections Component is designed as the most restrictive option. Except for employment and other structured program activities, an inmate in this component is restricted to the CCC. An inmate shall ordinarily be placed in

"Exhibit 1"  
Response

Issued  
7/15/21  
PB

Rec'd  
7/14/21

HER 1330.16 A  
AUGUST 15, 2011  
ATTACHMENT A

INFORMAL RESOLUTION

An inmate with a valid complaint should complete the first three sections below and submit the form to his/her respective Correctional Counselor.

1. Randy Lee Stapleton  
INMATE NAME  
Tahoe "B"  
UNIT

77152-112  
REGISTER NUMBER  
7/19/2021  
DATE

2. Nature of complaint (briefly state your problem):

Due to my impeccable, clear conduct there, from day 1 through the whole 33 months in (BOP) custody, and inmate (Stapleton) and Inmate (BOP/Warden) to immediately consider transferring me to a (RRC) pursuant to 18 U.S.C. § 3621(b) and without reference to certain BOP policies that I assert contradict the plain language and intent of § 3621(b).

3. Inmate's efforts to resolve problem (includes contact with staff, Inmate Requests to Staff Member submissions, etc.):

I was told by staff once I have 19 months left I will be considered for the exercise of discretion that must be based at least in part on the specific factors outlined in § 3621(b) and the BOP regulations, not forth in §§ 575.20 and 570.21 simply ignore these factors.

4. Steps taken /advice given to inmate regarding complaint:

You will be assessed at your next team per policy. Once you have completed the RDAP program factors then will be set forth.

5. Informal Resolution WAS ☒ WAS NOT accomplished (Circle One)

[Signature]  
Correctional Counselor

[Signature]  
Unit Manager

7/19/21  
Date

7/21/2021  
Date

COPY

STAPLETON, R.

77152 - 112

702 - 511L

"Exhibit 2"

UNICOR FEDERAL PRISON INDUSTRIES, INC.  
LEAVENWORTH, KANSAS

Case 2:22-cv-00678-DMC Document 1 Filed 04/18/22 Page 18 of 30

Issued

7/22/21

ccw

SK

U.S. DEPARTMENT OF JUSTICE  
Federal Bureau of Prisons

rec. 7/27/21

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Stapleton, Randy, L. 77152-112 Tahoe "B" FCI Herlong  
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

Part A- INMATE REQUEST

Due to "there is...no basis in section 3621(b) for distinguishing between residential community facilities and secure facilities. Moreover, the subsequent deletion of the definition of facility further undermines the argument that Congress intended to distinguish between residential community facilities and other kinds of facilities. Through the Second Chance Act of 2007 (Pub.L. No. 110-199, 122 Stat. 657 (2008), Congress restored and expanded historic norms. The act also restores the use of a halfway house for the service of an inmate's entire sentence. So, my request is to be considered immediately for (RRC) and/or home confinement in reference to my impeccable clear conduct from disciplinary for my whole 33 months in the BOP, and my charge, and/or criminal history is non violent.

7/23/2021

DATE

SIGNATURE OF REQUESTER

Part B- RESPONSE

COPY

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 1089948-FI

CASE NUMBER: \_\_\_\_\_

Part C- RECEIPT

Return to:

LAST NAME, FIRST, MIDDLE INITIAL

REG. NO.

UNIT

INSTITUTION



"Exhibit 2"  
Response

U.S. Department of Justice  
F.C.I. Herlong, California

Federal Bureau of Prisons  
Request for Administrative Remedy  
Part B - Response

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Administrative Remedy Number: 1089948-F1

---

This is in response to your Request for Administrative Remedy dated July 23, 2021, wherein you contend you are entitled to serve your entire sentence at a halfway house under the Second Chance Act. As relief, you request to be considered for immediate release to an RRC and/or home confinement.

An investigation into this matter revealed your Unit Team reviewed you for Residential Re-entry Center (RRC) placement and made their decision on an individual basis, using the following criteria: The resources of the facility contemplated; the nature and circumstances of the offense, the history and characteristics of the prisoner, any statement of the court that imposed the sentence (a) concerning the purposes for which the sentence to imprisonment was determined to be warranted or (b) recommending a type of penal or correctional facility as appropriate; and any pertinent policy statement issued by the U.S. Sentencing Commission.

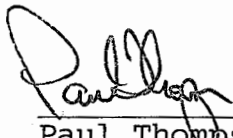
Additionally, Unit Team considered your need for services and potential risks to public safety in accordance with P7310.04, Community Corrections Center Utilization and Transfer Procedure. Your Unit Team's recommendation which is of sufficient duration to provide the greatest likelihood of successful reintegration into the community.

You are currently not eligible for RRC Placement.

You are encouraged to address your reentry needs during your next scheduled Program Review.

In view of the above, this response is for informational purposes.

If you are dissatisfied with the above findings, you may submit a Regional Appeal via Form BP-230(13), to the Regional Director, Federal Bureau of Prisons, Western Regional Office, 7338 Shoreline Drive, Stockton, California 95219, within 20 calendar days from the date of this response.

  
Paul Thompson, Warden

  
Date

EXTENSION OF TIME FOR RESPONSE - ADMINISTRATIVE REMEDY

DATE: AUGUST 30, 2021

FROM: ADMINISTRATIVE REMEDY COORDINATOR  
HERLONG FCI

TO : RANDY LEE STAPLETON, 77152-112  
HERLONG FCI      UNT: TAHOE B      QTR: T02-511L

ADDITIONAL TIME IS NEEDED TO RESPOND TO THE ADMINISTRATIVE REMEDY REQUEST IDENTIFIED BELOW. WE ARE EXTENDING THE TIME FOR RESPONSE AS PROVIDED FOR IN THE ADMINISTRATIVE REMEDY PROGRAM STATEMENT.

REMEDY ID : 1089948-F1  
DATE RECEIVED : AUGUST 4, 2021  
RESPONSE DUE : SEPTEMBER 13, 2021  
SUBJECT 1 : RESIDENTIAL REENTRY CENTER REFERRALS  
SUBJECT 2 :

"Exhibit 3"  
"NO Response"

RECEIPT - ADMINISTRATIVE REMEDY

DATE: JANUARY 25, 2022

FROM: ADMINISTRATIVE REMEDY COORDINATOR  
WESTERN REGIONAL OFFICE

TO : RANDY LEE STAPLETON, 77152-112  
HERLONG FCI      UNT: TAHOE B      QTR: T02-511L

THIS ACKNOWLEDGES THE RECEIPT OF THE REGIONAL APPEAL  
IDENTIFIED BELOW:

REMEDY ID : 1089948-R2  
DATE RECEIVED : JANUARY 11, 2022  
RESPONSE DUE : FEBRUARY 10, 2022  
SUBJECT 1 : RESIDENTIAL REENTRY CENTER REFERRALS  
SUBJECT 2 :

HERA2 \*ADMINISTRATIVE REMEDY GENERALIZED RETRIEVAL \* 03-08-2022  
PAGE 014 \* FULL SCREEN FORMAT \* 14:40:09

REGNO: 77152-112 NAME: STAPLETON, RANDY

RSP OF...: HER UNT/LOC/DST: TAHOE B

QTR.: T02-511L RCV OFC: HER

REMEDY ID: 1089948-F1

SUB1: 19FM SUB2:

DATE RCV: 08-04-2021

UNT RCV...:TAHOE B

QTR RCV.: T02-511L

FACL RCV: HER

UNT ORG...:TAHOE B

QTR ORG.: T02-511L

FACL ORG: HER

EVT FACL.: HER ACC LEV: HER 1 WXR 2

RESP DUE: MON 09-13-2021

ABSTRACT.: IMMEDIATE RRC OR HC DUE TO CLEAR CONDUCT

STATUS DT: 09-07-2021 STATUS CODE: CLO STATUS REASON: XPL

INCRPTNO.: RCT: P EXT: P DATE ENTD: 08-04-2021

REMARKS...:

CURRENT INVESTIGATIVE AND RELIEF TRACKING DATA

| DATE DUE       | DEPARTMENT | TO | DATE ASSN  | TRK TYPE | DATE RETURNED |
|----------------|------------|----|------------|----------|---------------|
| WED 08-11-2021 | UNT MGT    | ES | 08-04-2021 | INV      | 09-07-2021    |

G0002 MORE PAGES TO FOLLOW . . .

HERA2 \*ADMINISTRATIVE REMEDY GENERALIZED RETRIEVAL \* 03-08-2022  
PAGE 016 \* FULL SCREEN FORMAT \* 14:40:09

REGNO: 77152-112 NAME: STAPLETON, RANDY

RSP OF...: HER UNT/LOC/DST: TAHOE B

QTR.: T02-511L RCV OFC: WXR

REMEDY ID: 1089948-R1

SUB1: 19FM SUB2:

DATE RCV: 09-12-2021

UNT RCV...:TAHOE B

QTR RCV.: T02-511L

FACL RCV: HER

UNT ORG...:TAHOE B

QTR ORG.: T02-511L

FACL ORG: HER

EVT FACL.: HER

ACC LEV: HER 1 WXR 2

RESP DUE:

ABSTRACT.: IMMEDIATE RRC OR HC DUE TO CLEAR CONDUCT

STATUS DT: 09-12-2021 STATUS CODE: REJ STATUS REASON: IRQ -

INCRPTNO.:

RCT:

EXT:

DATE ENTD: 09-12-2021

REMARKS...:

*Did not provide a  
copy of your B.P.9.  
on Warden's Response.*

G0002

MORE PAGES TO FOLLOW . . .



HERA2 \*ADMINISTRATIVE REMEDY GENERALIZED RETRIEVAL \* 03-08-2022  
PAGE 020 \* FULL SCREEN FORMAT \* 14:40:09

REGNO: 77152-112 NAME: STAPLETON, RANDY

RSP OF...: HER UNT/LOC/DST: TAHOE B

QTR.: T02-511L RCV OFC: WXR

REMEDY ID: 1089948-R2 SUB1: 19FM SUB2:

DATE RCV: 01-11-2022

UNT RCV...:TAHOE B

QTR RCV.: T02-511L

FACL RCV: HER

UNT ORG...:TAHOE B

QTR ORG.: T02-511L

FACL ORG: HER

EVT FACL.: HER ACC LEV: HER 1 WXR 2

RESP DUE: THU 02-10-2022

ABSTRACT.: IMMEDIATE RRC OR HC DUE TO CLEAR CONDUCT

STATUS DT: 02-07-2022 STATUS CODE: CLO STATUS REASON: XPL -

INCRPTNO.: RCT: P EXT: DATE ENTD: 01-11-2022

REMARKS...: APPEAL IS TIMELY

*Information  
ON Explanation  
only.*

G0002 MORE PAGES TO FOLLOW . . .

TRULINCS 77152112 - STAPLETON, RANDY LEE - Unit: HER-T-B

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FROM: 77152112

TO: Tahoe Unit Team

SUBJECT: \*\*\*Request to Staff\*\*\* STAPLETON, RANDY, Reg# 77152112, HER-T-B

DATE: 11/25/2021 01:00:14 PM

To: Mr. Wilson

Inmate Work Assignment: RDAP

According to a recent memorandum for regional directions, wardens, and residential reentry managers (pursuant to memorandum published on May, 24th 2013), from Blake R. Davis, Assistant Director for the Correctional Programs Division regarding the Guidance for Home Confinement and Residential Reentry Center Placements...

#### "I. Guiding Principles for Effective Community Placements

The Bureau's RRC resources continue to be limited and must be focused on those inmates with the greatest need and the ("highest risk of recidivism"). Program Statement 7310.04, Community Corrections Center Utilization and Transfer Procedures, requires that RRC placements be made based on assessments of inmate needs for services, public safety, and the necessity of the Bureau to manage its inmate population responsibly. The Second Chance Act emphasizes the requirement that all inmates are eligible for pre-release RRC placement consideration and are to be assessed on an individual basis." So, My Point is Due to having a "High Recidivism" the (RRC/Home Confinement) is For Prisoners Like MySelf due also to Their Structured Environments. Mr. Wilson, i am Requesting To be Transferred To (RRC/Home Confinement) due to 3621 B. There is No Limit on How Long A Federal Prisoner Can Be Placed In A Halfway House Under 18 U.S.C.3621(b), because they are Considered a "Penal or Correctional Facility" Within the Meaning of 18 U.S.C.3621(b). Also The BOP Recognizes this Authority. In a November 14, 2008, memorandum entitled "Inmates Requests For Transfer To Residential Reentry Centers," BOP's Former General Counsel, Kathleen Kenney, wrote that: "Inmates are Legally eligible to be placed in an RRC at any time during their Prison Sentence. Federal Courts have made Clear that RRC's Are Penal or Correctional institutions within the meaning of applicable Statutes. Staff Cannot, therefore, Automatically Deny an inmate's request for RRC transfer. In other words, staff "Cannot" say that an inmate, Whatever the Circumstances, "is Automatically ineligible for transfer to RRC. But i have been Denied!! MR. STAPLETON

TRULINCS 77152112 - STAPLETON, RANDY LEE - Unit: HER-T-B

FROM: 77152112

TO: Tahoe Unit Team

SUBJECT: Re: Re: \*\*\*Request to Staff\*\*\* STAPLETON, RANDY, Reg# 77152112, HER-T-B

DATE: 11/28/2021 03:05:35 PM

Goodafternoon, Thank You,and Yes! I have Started The Process,Your Right "Any Time" Due to the Fact that (RRC/Home Confinement),Are Penal,and Still Considered Correctional Facilities,and they Meet Minimum standards of Health,and habitability,and are Still Considered Custody Of The (BOP)...just Like Being On Home Confinement i Will Still be in the Custody Of The (BOP).I have More then Half My Sentence Complete,and Have Received No Negative Write ups,and being Programing the Whole time of My incarceration,and i have an Home Confinement Eligiblity Release date thats Less then 2years away,and i Have "NO Violent Criminal History" at ALL!!! So, with All due respect if Your Not Willing to Place Me For (RRC/Home Confinement) at this time as i am Respectfully Requesting then Your Denying Me (RRC/Home Confinement) Placement that Violates The Congress's Plain intent Of 18 U.S.C. 3621(b),that says "At Any Time" During My Sentence i Am Eligible For (RRC/Home Confinement) Placement...and,there in Nothing ANYWHERE in the Statue that States "Prior to 17 to 19 months before My Release date. So, Since Your Not Willing to Place Me Now.. I Am Taking this as a Denail. Thank You!! have a Great day! MR. RANDY LEE STAPLETON,77152-112.

-----Tahoe Unit Team on 11/28/2021 1:42 PM wrote:

>

18 USC 3621:

(b) PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

- (1) the resources of the facility contemplated;
- (2) the nature and circumstances of the offense;
- (3) the history and characteristics of the prisoner;
- (4) any statement by the court that imposed the sentence—
  - (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
  - (B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse. Any order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment in a community corrections facility shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment of that person.

So in following that we are again not referring you to the RRC until appropriate by BOP policy. If you disagree with this statement then please begin your administrative remedies.

-Wilson, CSW

>>> ~^!"STAPLETON, ~^!RANDY LEE" <77152112@inmatemessage.com>

Read this 'it's about the halfway house / home confinement'.

"Exhibit" "6"

KeyCite Yellow Flag - Negative Treatment  
Disagreed With by McElhenny v. Mukasey, N.D. Tex., October 23, 2008  
541 F.3d 1180  
United States Court of Appeals,  
Ninth Circuit.

Jose RODRIGUEZ, Petitioner-Appellee,  
v.  
Dennis SMITH, Warden,  
Respondent-Appellant.  
No. 07-16014.

Argued and Submitted March 11, 2008.  
Filed Sept. 4, 2008.

Synopsis  
Background: Federal prison inmate brought habeas corpus petition to compel Bureau of Prisons (BOP) to immediately consider transferring him to residential reentry center (RRC). The United States District Court for the Eastern District of California, 2007 WL 1101474, Lawrence J. O'Neill, J., granted petition, and government appealed.

[Holding:] As a matter of first impression, the Court of Appeals, Rawlinson, Circuit Judge, held that statute governing BOP's prisoner placement did not authorize regulations restricting placement in RRCs.

Affirmed.

Rymet, Circuit Judge, filed dissenting opinion.

West Headnotes (3)

[1] Criminal Law—Review De Novo

110Criminal Law

110XXIVReview

110XXIV(S)Scope of Review in General

110XXIV(L)3Review De Novo

110K1139In general

Federal appellate court reviews questions of statutory interpretation de novo.

4 Cases that cite this headnote

[2] Administrative Law and Procedure—Prisons and prisoners, pretrial detention  
Prisons—Regulation and supervision in general: role of courts

\*1181 McGregor, W. Scott, Thomas E. Flynn, Sacramento, CA, (retired), and Phillip A. Talbert, Sacramento, CA, (argued), for respondent-appellant Dennis Smith.  
Stephen R. Sady, Lynn DeFoeach, Portland, OR, for petitioner-appellee Jose Rodriguez.

15AAdministrative Law and Procedure  
15AVIIAdministrative Construction of Statutes  
15AVIII(B)Particular Statutes and Contexts  
15A2207Criminal Justice  
15A2231OPrisoners and prisoners: pretrial detention  
(Formerly 15A4438(6), 361219(6.1))

310Prisons  
310IPrisoners and inmates  
310IIE)Place or Mode of Confinement  
310K211Regulation and supervision in general: role of courts  
(Formerly 361K.19(6.1))

Bureau of Prisons' (BOP) interpretation of statute governing designation of place of imprisonment was entitled to Chevron deference, since BOP administered statute. 18 U.S.C.A. § 3621(b).

75 Cases that cite this headnote

Prisons—Conditional release: community placement

310Prisons  
310IPrisoners and inmates  
310IIPDuration of Confinement  
310K248Conditional release: community placement  
(Formerly 310K13.3)

Statute governing Bureau of Prisons' (BOP) designation of place of imprisonment did not authorize BOP regulations restricting prisoners' placement in residential reentry centers (RRCs), i.e. halfway houses, to lesser of last 10% or last six months of their sentences; 'regulations violated statute's clear instruction that all placement and transfer determinations take into consideration each of five enumerated factors. 18 U.S.C.A. § 3621(b); 28 C.F.R. §§ 570.20, 570.21.

178 Cases that cite this headnote

West Codenotes

Held Invalid

28 C.F.R. §§ 570.21, 570.21

Attorneys and Law Firms

Appeal from the United States District Court for the Eastern District of California; Lawrence J. O'Neill, District Judge, Presiding. D.C. No. CV-07-00190-LJO/LB.

Before: PROCTER HUG, JR., PAMELA ANN RYMER, and JOHNNIE B. RAWLINSON, Circuit Judges.

Opinion

Opinion by Judge RAWLINSON; Dissent by Judge RYMER.

RAWLINSON, Circuit Judge:

Petitioner-Appellee Jose Rodriguez (Rodriguez) filed a petition for writ of habeas corpus seeking an order directing the Bureau of Prisons (BOP) to immediately consider transferring Rodriguez to a Residential Re-entry Center (RRC) pursuant to the factors set forth in 18 U.S.C. § 3621(b), and without reference to certain BOP policies that he asserted contradict the plain language and intent of § 3621(b). The district court granted the petition. Respondent-Appellant Warden Dennis Smith (Smith) appeals the district court's order. We conclude that the BOP's categorical exercise of discretion as promulgated in 28 C.F.R. §§ 570.20 and 570.21 violates Congress's intention regarding the statutory inmate placement and transfer considerations the BOP must undertake, and we affirm the district court's decision.

Although the parties both agree that RRCs were formally referred to as Community Correction Centers (CCCs) and are commonly known as "halfway houses," Smith refers to them as RRCs and Rodriguez uses the term CCC. This opinion will use the term RRC throughout.

I. FACTS AND PROCEDURAL HISTORY

A. Factual Background

Rodriguez pled guilty to charges of conspiracy to distribute methamphetamine and money laundering, and, in April, 2001, was sentenced to 195 months in federal prison. His projected release date is November 11, 2013.

When Rodriguez was advised that he would not be eligible for consideration for RRC placement until 11–13 months immediately preceding his projected release date, he filed a petition for a writ of habeas corpus challenging the BOP's regulations that prevented him from being immediately considered for RRC placement. The petition asserted that the BOP's policy directly conflicts with 18 U.S.C. § 3621(b).

Having served "over 60 percent" of his sentence, Rodriguez argued that he was eligible for consideration for a less restrictive placement.

The magistrate judge recommended that the district court grant the petition, stating: "1182 '[A]lthough the BOP has discretion to refuse to place an inmate in a correctional facility, the exercise of discretion must be based at least in part on the specific factors outlined in § 3621(b), and the BOP regulations set forth in §§ 570.20 and 570.21 simply ignore those factors. As such, the regulations contradict, rather than interpret, § 3621(b), and no deference is owed.' The magistrate judge also recommended that Smith 'be [ordered] to consider the appropriateness of transferring [Rodriguez] to an RRC in light of the factors set forth in § 3621(b), not excluding any other factors deemed appropriate by the BOP, without reference to [the challenged] BOP policy ...'"

The district court adopted the Findings and Recommendation and granted the petition. Smith filed a timely notice of appeal.

B. Statutory and Regulatory Background

Under 18 U.S.C. § 3621(b), the BOP has authority to designate the place of an inmate's imprisonment. Prior to December 13, 2002, the BOP exercised its discretion to allow a prisoner to serve all or part of his imprisonment in an RRC. See 69 Fed. Reg. 51213 (Aug. 18, 2004). This practice came to an end following the issuance of a legal opinion by the Office of Legal Counsel (OLC) of the Department of Justice advising that § 3621(b) did not authorize the BOP to place an inmate in an RRC for the entire term of his sentence, because community confinement did not constitute imprisonment. *Id.* The OLC relied on 18 U.S.C. § 3624(c) and the OLC's understanding that this section allowed placement in community confinement only during the last ten percent of the prison sentence being served. *Id.*



Section 3621(b) provides:  
 § 3621 Imprisonment of a convicted person

(b) Place of imprisonment.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habilitation established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

- (1) the resources of the facility contemplated;
- (2) the nature and circumstances of the offense;
- (3) the history and characteristics of the prisoner;
- (4) any statement by the court that imposed the sentence—
- (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
- (B) recommending a type of penal or correctional facility as appropriate; and
- (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse.

18 U.S.C. § 3621(b).

Accordingly, effective December 20, 2002, the BOP changed its procedure to limit the time during which an inmate was eligible for placement in an RRC to the final ten percent of his sentence, or six months, whichever was shorter. *Id.* However, the BOP's "change was challenged in the Federal courts." *Id.* Both the First and the Eighth Circuits invalidated this policy because it failed to recognize the "1183 BOP's discretion to transfer an inmate to an RRC at any time, as provided in § 3621. See *Goldings v. Miller*, 383 F.3d 117, 24 (1st Cir. 2004); *see also* *Edwards v. Jeter*, 386 F.3d 842, 847 (8th Cir. 2004).

In response to these decisions, the BOP changed course. Contradicting its earlier position in 2002 that it lacked authority to place an inmate in an RRC prior to the end of the

inmate's sentence, the BOP recognized that it generally has discretion under § 3621(b) to place an inmate in an RRC at any time. See 69 Fed. Reg. 51213. However, the BOP elected to "exercise its discretion categorically to limit inmates' community confinement to the last ten percent of the prison sentence being served, not to exceed six months." *Id.*

The final rules were published as 28 C.F.R. §§ 570.20, 570.21 on January 10, 2005, see 70 F.R. 1659, 2005 WL 34181, and became effective on February 14, 2005. *Id.*

Section 570.20 provides:

3

§ 570.20 What is the purpose of this subpart?  
 (a) This subpart provides the Bureau of Prisons' (Bureau) categorical exercise of discretion for designating inmates to community confinement. The Bureau designates inmates to community confinement only as part of pre-release custody and programming which will afford the prisoner a reasonable opportunity to adjust to and prepare for re-entry into the community.

(b) As discussed in this subpart, the term "community confinement" includes Community Corrections Centers (CCC) (also known as "halfway houses") and home confinement.

28 C.F.R. § 570.20

Section 570.21 provides:

§ 570.21 When will the Bureau designate inmates to community confinement?

(a) The Bureau will designate inmates to community confinement only as part of pre-release custody and programming, during the last ten percent of the prison sentence being served, not to exceed six months.

(b) We may exceed these time-frames only when specific Bureau programs allow greater periods of community confinement, as provided by separate statutory authority (for example, residential substance abuse treatment program (18 U.S.C. 3621(a)(2)(A)) or shock incarceration program (18 U.S.C. 4046(e)).

28 C.F.R. § 570.21

### C. Other Circuit Court Decisions

Although this case raises an issue of first impression in this Circuit, as discussed below, five other circuits have directly addressed the matter. See *Muller v. Schulz*, 517 F.3d 29 (1st Cir. 2008); *Levine v. Acker*, 455 F.3d 71, 87 (2d Cir. 2005); *Woodell v. Fed. Bureau of Prisons*, 432 F.3d 235, 244 (3d Cir. 2005); *Felix v. Sommers*, 442 F.3d 1088, 1091 (8th Cir. 2006); and *Wiedersheim v. Miller*, 477 F.3d 1160, 1161-62 (10th Cir. 2007). The Second, Third, Eighth and Tenth Circuits

have each concluded that Congress's intent regarding inmate placement and transfer is clear from the plain language of 18 U.S.C. § 3621(b), and the BOP regulations establishing a categorical temporal limitation on eligibility for RRC placement contravene the plain meaning of the statute. Only the First Circuit has upheld the BOP regulations as an appropriate exercise of the BOP's discretion.

### II. STANDARD OF REVIEW

[1] [2] We review questions of statutory interpretation *de novo*. *United States v. Horvath*, 492 F.3d 1075, 1077 (9th Cir. 2007). "Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chervon U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 457 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694." *Nat'l Fed. v. Fomils*, 413 F.3d 991, 997 (9th Cir. 2005) (citations omitted).

"1184 Under the *Chervon* framework we must 'first determine[] if Congress has directly spoken to the precise question at issue, in such a way that the intent of Congress is clear.' *Id.* (citation and internal quotation marks omitted). 'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' *Chervon*, 457 U.S. at 842-43, 104 S.Ct. 2778 (footnote reference omitted).

### III. DISCUSSION

A. The BOP Regulations Violate the Clear and Unambiguous Congressional Intent Expressed in § 3621(b).

Employing the *Chervon* analysis, we must first determine whether Congress's intention regarding the BOP's discretion in determining prisoner placements and transfers is clear from the text of 18 U.S.C. § 3621(b). If the statute is clear, we then decide whether the BOP's regulation violates that clearly expressed intent. *Chervon*, 457 U.S. at 842-43, 104 S.Ct. 2778.

[3] Smith relies on 18 U.S.C. § 3624(c) to explain the interplay between the BOP regulations and § 3621(b). He argues that because § 3624(c) limits when an inmate may be placed in an RRC, "prisoners have no right to be considered for an RRC placement until they have finished 90% of their sentence. Seen from this point of view, the BOP's decision in the regulations to impose exactly this limitation is not only a reasonable interpretation of the statute, but the only reasonable interpretation." In essence, Smith contends that in light of § 3624(c), Congress's intent with respect to § 3621(b) is not clear from the statute, and thus deference is owed to the BOP's interpretations (as expressed in 28 C.F.R. §§ 570.20 and

570.21).

However, the plain language of both §§ 3621(b) and 3624(c) make clear that this argument must fail. Section 3621(b) provides in part that "[t]he Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habilitation established by the Bureau, whether maintained by the Federal Government or otherwise.... The Bureau may at any time... direct the transfer of a prisoner from one penal or correctional facility to another." 18 U.S.C. § 3621(b) (emphasis added).

Section 3624(c) provides: "The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community." 18 U.S.C. § 3624(c).

Section 3624(c) was amended effective April 9, 2008, slightly rewording the affirmative duty of the BOP to ensure to the extent practicable the release of a prisoner during the final months of the prisoner's term. The statutory amendment does not affect this opinion.

Contrary to Smith's argument that § 3624(c) limits placement in RRCs to the last ten percent of the sentence being served, the statute provides that "of" the last ten percent of the prisoner's sentence, the BOP still, to the extent practicable, allow a prisoner to spend up to six months of that time in an institution such as an RRC. *See id.* (emphasis added). Thus, although this statute imposes an affirmative duty on the BOP to consider placing an inmate in community confinement or a similar pre-release alternative toward the end of the inmate's prison term, it does not interfere with the BOP's discretionary authority "1185 to consider such placement prior to the last ten percent of the prison term.

As noted, a majority of the other circuit courts that have considered this issue have concluded that the BOP's interpretation of § 3624(c) is misplaced. *See Wiedersheim*, 477 F.3d at 1166. "Although § 3624(c) surely imposes an affirmative obligation on the BOP, whenever practicable, to place an inmate in a CCC or other form of community confinement as the inmate's release date nears, § 3624(c) has no bearing on whether a CCC may be considered as a place of imprisonment at some earlier point in a prisoner's period of incarceration." (citations omitted). *see also Woodell*, 432 F.3d at 250; *Goldings*, 383 F.3d at 24; *Edwards*, 386 F.3d at 845-47.



In support of his position that § 3624(c) limits placement into RRCs, Smith invokes our decision in *United States v. Lattimer*, 991 F.2d 1509, 1514–15 (9th Cir. 1993), for the proposition that “[i]nholding in § 3621(b) requires the BOP to recognize an RRC as an acceptable substitute for a term of imprisonment and [we] would be going against the *Lattimer* ruling if [we] were to hold that RRCs were generally intended, or even permissible, places for serving a sentence of imprisonment.” In *Lattimer*, we held that based on the differentiation of detention in community treatment centers and incarceration in prison in various sections of the United States Sentencing Guidelines, the defendant’s confinement in a community treatment center did not constitute imprisonment for purposes of calculating his criminal history score under Section 4A1.2(a)(1). *Lattimer*, 991 F.2d at 1514. In reaching this conclusion, we noted that the Commission had not “clearly said whether confinement in a community treatment center qualifies as incarceration,” and relied upon the rule of lenity as further support for our reading of the Guidelines, noting that the question would determine whether the defendant would be required to spend “an additional 15 years of his life behind bars.” *Id.*

More recently, we ruled that placement in a Pre-Release Center did not constitute imprisonment under 18 U.S.C. § 3624(a), and therefore did not toll the defendant’s supervisory release period. *United States v. Sullivan*, 504 F.3d 989, 971–72 (9th Cir. 2007), see also *Reyes v. Kovac*, 515 U.S. 50, 63–65, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) (holding that time spent by prisoner at a community treatment center while “released on bail” was not “official detention” (internal quotation marks omitted)). However, in *Lattimer*, our holding was limited to Section 4A1.2 of the Sentencing Guidelines to calculate the defendant’s criminal history score, see 991 F.2d at 1514, and in *Sullivan*, to 18 U.S.C. § 3764(a), to determine tolling of the supervised release period. See 504 F.3d at 972.

In both cases, an important factor was our recognition that ambiguous provisions should be interpreted for the benefit of the defendant/releasee. See *Lattimer*, 991 F.2d at 1514 (applying the rule of lenity to “resolve ambiguities in favor of the criminal defendant”); see also *Sullivan*, 504 F.3d at 972–73 (interpreting § 3264(a) and concluding that the supervised release period had expired, precluding revocation). These cases offer no assistance to Smith for two reasons. First, as discussed above, the statutory provisions in this case are unambiguous. Second, even if the provisions were unambiguous, the rule of lenity would dictate an interpretation favoring earlier placement in an RRC.

In any event, the BOP itself has acknowledged that § 326(b) grants it the authority to “place offenders sentenced to a term of imprisonment in [RRCs].” See 69 Fed. Reg. at \*51213. Indeed, this discretion to place inmates into RRCs is the basis for the very BOP inmates Smith seeks to have upheld in this case. See *Lattimer*, 455 F.3d at 82. Thus, a discussion of whether confinement in an RRC constitutes imprisonment does not resolve the issue we must resolve.

Section 3621(b) specifically provides that the BOP has discretion to place an inmate into “any available penal or correctional facility” and to “direct the transfer of an inmate from one penal or correctional facility to another,” “at any time.” 18 U.S.C. § 3621(b). In contrast, the plain language of § 3624(c) addresses the separate and unrelated authority and obligation to place inmates into RRCs during the last ten percent of their sentences. Thus, we agree with the Tenth Circuit’s conclusion “1186 in *Wiedelstedt* that ‘§ 3624(b) has no bearing on whether §§ 370.20 and 370.21 are consistent with the § 3621(b) statutory scheme for BOP placement and transfer determinations.’” 477 F.3d at 1166.

Stripped of the attempted link to § 3624(c), Smith’s contention that the BOP’s temporal restriction on RRC placement comports with § 3621(b) is singularly unpersuasive. The BOP regulations necessarily violate the unambiguously expressed intent of Congress conveyed in § 3621(b), which expressly instructs that all placement and transfer determinations take into consideration each of the five factors enumerated in the statute.<sup>4</sup> That Congress intended the BOP to apply each of the factors is evidenced by the invocation of the word “and” between the fourth and fifth factors. See *Wiedelstedt*, 477 F.3d at 1165–66; see also *Hawaiian Telephone Co. v. Public Utilities Comm’n*, 827 F.2d 1264, 1273 (9th Cir. 1987) (noting that use of the conjunctive indicates that all of the conditions listed must be met).

The factors the BOP must consider under § 3621(b) are: “(1) the resources of the facility contemplated; (2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; (4) any statement by the court that imposed the sentence—(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or (B) recommending a type of penal or correctional facility as appropriate; and (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(b)(2) of title 28.” 18 U.S.C. § 3621(b).

As aptly stated in *Wiedelstedt*, 477 F.3d at 1161, “[t]he relationships between the two statutes and between § 3621(b) and the regulations ... lie at the core of the dispute ...”

“18 U.S.C. § 3621(b) ... gives the agency discretion.... This delegation of discretion, however, is cabined by further mandatory direction ... to consider the five factors enumerated in the statute ...” *Id.* at 1165 (citation, alteration and internal quotation marks omitted).

“After considering the language of § 3621(b) and the relationship between its qualified grant of discretion and § 3624(c)’s affirmative obligation,” the Tenth Circuit saw no conflict between the two statutes. *Id.* at 1166.

The Tenth Circuit explained that:

The statutory command in § 3621(b) stands alone as a clear and unambiguous articulation of congressional intent regarding the process by which the BOP should make placement and transfer determinations. Although § 3624(c) surely imposes an affirmative obligation on the BOP, whenever practicable, to place an inmate in a CCC or other form of community confinement as the inmate’s release date nears, § 3624(c) has no bearing on whether a CCC may be considered as a place of imprisonment at some earlier point in a prisoner’s period of incarceration.

*Id.* at 1166 (citations omitted); see also *Lattimer*, 455 F.3d at 75 (“[T]he combined import of the statutes was to give the BOP discretion to transfer an inmate to a CCC for a period longer than six months or ten percent of his sentence, but to oblige the BOP, where practicable, to transfer inmates to a CCC for a reasonable part of the last ten percent, not to exceed six months of his sentence.”) (citations omitted).

The Second Circuit is in accord. See *Lattimer*, 455 F.3d at 82 (noting that § 3621(b) authorizes the BOP to “place a prisoner where it wishes so long as it considers the factors enumerated ...”) (citations and emphasis omitted); see also *Woodall*, 432 F.3d at 245; *Falls*, 442 F.3d at 1092.

\*1187 We are persuaded that the BOP regulations conflict with the provisions of § 3621(b). As the Third Circuit decision explained: “While the BOP may exercise considerable discretion, it must do so using the factors the Congress has specifically enumerated.” *Woodall*, 432 F.3d at 242. We agree with the Third Circuit that an “unavoidable conflict” exists because the statute requires the BOP to consider five factors in determining CCC placement, while the regulation provides that the enumerated factors will not be fully considered. *Id.* at 249. We also join the Third Circuit in its conclusion that the regulations’ construction is not “permissible ... because they fail to take into account Congress’s indications that certain individualized factors ... should be considered ...” *Id.* (citation omitted); see also *Lattimer*, 455 F.3d at 86 (“Categorical rulemaking, like all forms of agency regulation, must be consistent with unambiguous Congressional instructions ...”). *Falls*, 442 F.3d at 1091.

In *Meritz*, the First Circuit concluded that the five factors listed in § 3621(b) were not exclusive. *Meritz*, 547 F.3d at 35. The First Circuit added that, in its view, “[n]othing in this passage requires consideration of the five factors for every facility or type of facility that is ruled out. *Meritz* stated a clear expression of intent to withhold the authority to make rules of general applicability.” *Id.* at 38 (emphasis in original). We agree with the First Circuit that the statute contains no specific prohibition on rules of general applicability. The problem,

however, is that the rules of general applicability promulgated by the BOP categorically exclude inmates from RRC eligibility without considering the mandatory factors articulated in § 3621(b). Although, as the First Circuit recognized, other factors may be considered, § 3621 and the accompanying legislative history embody unambiguous Congressional intent that the five factors not be ignored. See 18 U.S.C. § 3621(b); see also S.Rep. No. 98–225, reprinted in 1984 U.S.C.A.N. 3182, 3324–25 (“In determining the available or suitability of the facility selected, the Bureau is specifically required to consider such factors as the resources of the facility, the nature and circumstances of the offense, the history and characteristics of the prisoner, the statements made by the sentencing court concerning the purposes for imprisonment in a particular case, any recommendations as to type of facility made by the court, and any pertinent policy statements issued by the sentencing commission ... After considering these factors, the Bureau of Prisons may designate the place of imprisonment in an appropriate type of facility, or may transfer the offender to another appropriate facility.”) (emphases added) (footnote reference omitted).

Because the BOP regulations categorically exclude CCC placement of inmates with more than ten percent of their sentences remaining, they necessarily fail to apply the mandatory factors listed in § 3621(b) to those inmates. This failure to consider the five statutory factors when considering eligibility for placement in or transfer to an RRC violates Congress’s clear intent that each of these factors be applied in making inmate transfer or placement determinations to “any available penal or correctional facility.” 18 U.S.C. § 3621(b) (emphasis added).

The *Meritz* opinion “emphasize[d] that were the regulations to leave little or no room for the opportunity of the individualized assessment implied by Congress, we would regard that as contrary to intent of the statute.” 517 F.3d at 39 n. 17. However, that is precisely what the categorical BOP regulations accomplished—they left “no room for the operation of the individualized ‘1188 assessment’ expressly mandated in § 3621(b).” *Id.* We cannot agree with the First Circuit that the categorical failure to comply with unambiguously expressed Congressional intent can be rationalized away. Rather, we agree with the Second, Third, Eighth and Tenth Circuits’ conclusions that the BOP regulations cannot be reconciled with the unambiguous congressional intent expressed in § 3621(b). See *Wiedelstedt*, 477 F.3d at 1162; *Lattimer*, 455 F.3d at 87; *Falls*, 442 F.3d at 1091; *Woodall*, 432 F.3d at 249. Accordingly, the regulations are invalid under *Chevron*.

B. The Supreme Court’s Ruling in *Lopez* Does Not Support the BOP’s Categorical Exercise of Discretion.

Relying on the Supreme Court's decision in *Lopez v. Davis*, 531 U.S. 230, 121 S.Ct. 714, 148 L.Ed.2d 633 (2000), the First Circuit held that "[t]he question whether a CCC is an appropriate facility for any prisoner during the first ninety percent of a term is a subset of the broader question of 'what specific facility is the right one to house each prisoner.'" *Mattiz*, 517 F.3d at 39. The First Circuit reasoned that deciding that "subset" on a categorical basis is not the same as deciding the final issue of placement on a categorical basis." *Id.* However, this linguistic hairsplitting does not change the fact that the regulations thwart the explicitly expressed will of Congress.

In *Lopez*, the Supreme Court upheld a BOP regulation that categorically excluded inmates convicted of offenses involving firearms from discretionary early release eligibility under 18 U.S.C. § 3621(e)(2)(B). 531 U.S. at 233, 121 S.Ct. 714. However, the Supreme Court expressly noted that § 3621(e)(2)(B) did not require "individualized determinations." *Id.* at 243-44, 121 S.Ct. 714. The Court also emphasized that Congress was silent as to the "precise question at issue" and a "statutory gap" existed. *Id.* at 242, 121 S.Ct. 714.

The Court in *Lopez* pointedly discussed the absence from the statutory language of any criteria the BOP could use in applying the statute. *Id.* In contrast, § 3621(b) provides a list of five factors, all of which the BOP must consider in determining prisoner placement. See 18 U.S.C. § 3621(b)(1)-(5). Moreover, at least three of these factors are inmate-specific. See *id.* at § 3621(b)(2)-(4) (calling for consideration of "(2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; and (4) any statement by the court that imposed the sentence ..."). Thus, unlike the statute in *Lopez*, the BOP is not left without guidance on how to apply the statute.

We echo the observations made by the Tenth Circuit:

*Lopez* makes clear ... that an agency's authority to promulgate categorical rules is limited by clear congressional intent to the contrary. In other words, *Lopez* applies only when Congress has not spoken to the precise issue and the statute contains a gap. The *Lopez* Court was careful to state that 18 U.S.C. § 3621(e)(2)(B) ... did not identify any criteria for the BOP to use ... Section 3621(b), in contrast, enumerates five factors, including three that are specific to the individual prisoner ...

*Wetzel*, 477 F.3d at 1168 (citations omitted); see also *Levine*, 455 F.3d at 86; *Evils*, 442 F.3d at 1091; *Woodell*, 432 F.3d at 247 (noting that "sentencing recommendations and other individual factors ... are not generally applicable," as was the case in *Lopez*, where the only factor at issue was use of a firearm during the crime of conviction. "Moreover,

Congress did appear to express intent to withhold from the BOP the authority to make CCC placements without the guidance of the statutory factors.") (emphasis in the original).

\*1189 Like the majority of our sister circuits that have considered this argument, we are not persuaded that *Lopez* supports the BOP's categorical exercise of discretion when administering § 3621(b).

Finally, we are not convinced that reference to some of the factors in the BOP regulations translates into compliance with the statutory command contained in § 3621(b). See *Mattiz*, 517 F.3d at 39. As the Tenth Circuit astutely remarked:

The BOP cannot validate this otherwise invalid regulation by claiming to have categorically considered the five statutory factors during the rulemaking process. The individualized nature of three of the five factors—the nature of the prisoner's offense, the prisoner's history and characteristics, and the sentencing judge's statement—made such consideration impossible. *Wetzel*, 477 F.3d at 1168 (citing *Evils*, 442 F.3d at 1092); see also *Woodell*, 432 F.3d at 248.

#### IV. CONCLUSION

The BOP's regulations conflict with the plain language of 18 U.S.C. § 3621(b) as to when an inmate may be considered for initial placement in or transfer to an RRC. We therefore AFFIRM the district court's order granting the writ of habeas corpus ordering the BOP to promptly consider Rodriguez for transfer to an RRC without reference to 28 C.F.R. §§ 570.20 and 570.21.

AFFIRMED.

RYMER, Circuit Judge, dissenting.

While I understand joining the parade of courts to decide this issue, I would reverse for the reasons stated in *Mattiz v. Seibol*, 517 F.3d 29, 31 (1st Cir.2008), and in Judge Reger's well-reasoned dissent in *Levine v. Agher*, 455 F.3d 71, 87 (2d Cir.2006).

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